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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD RAMIREZ,

Defendant and Appellant.

D070532

(Super. Ct. No. SCD266043)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel F. Link, Judge. Affirmed as modified and remanded with directions.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Ramirez pleaded guilty to one count of assault with force likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(4)) and admitted he personally

¹ All further statutory references are to the Penal Code unless otherwise specified.

inflicted great bodily injury (§ 12022.7). Ramirez was granted probation subject to certain conditions.

Ramirez objected to one of the probation conditions at the time of sentencing, however the court imposed the conditions over objection. Specifically, Ramirez objected to a search condition, which not only included a general Fourth Amendment waiver, but also included searches of computers and recordable media as overbroad. Although Ramirez did not object to conditions regarding the possession of weapons and being in a place where weapons might be found or to a condition that prohibited possession and use of marijuana, Ramirez now contends these conditions are constitutionally overbroad.

We will find the general Fourth Amendment waiver valid and appropriate to this case, however, we will find no justification for the inclusion of "computers and recordable media" in the search condition for this defendant on this record. We will find the weapons condition to be valid and reject Ramirez's arguments to the contrary. We will find the marijuana condition to be vague. Accordingly, we will remand the case to the trial court with directions to strike the portions of the search condition including "computers and recordable media," and to modify the marijuana condition.

STATEMENT OF FACTS²

During the early morning hours of February 28, 2016, police responded to a fight in a parking lot in the Pacific Beach area of San Diego. Police discovered the victim had been "jumped" by several males who had fled the scene.

² The facts are taken from the probation officer's report.

The victim told police he had been approached by a woman who was flirting with him. Thereafter, a male approached him, accused him of flirting with the woman and punched the victim in the face.

The victim left the bar and went to the parking lot where he was accosted by several men. The victim was knocked to the ground and kicked several times until he lost consciousness. A witness identified Ramirez as one of the attackers. Ramirez was intoxicated at the time he assaulted the victim.

DISCUSSION

1. Legal Principles

A grant of probation to a convicted felon is an act of clemency by the trial court. The purpose of probation is rehabilitation of the offender and protection of the public from future criminal activity. (*People v. Moran* (2016) 1 Cal.5th 398, 402 (*Moran*).) Trial courts have broad discretion to fashion appropriate conditions to accomplish the rehabilitative and protective goals of probation. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).)

Under *People v. Lent* (1975) 15 Cal.3d 481, 486, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Olguin, supra*, 45 Cal.4th at 379.) " 'This test is conjunctive -- all three prongs must be satisfied before a reviewing court will invalidate a probation term.' " (*Moran, supra*, 1 Cal.5th at p. 403.)

Where a condition of probation places a burden on a person's constitutional rights, the condition must not be vague and must be narrowly tailored to the necessary rehabilitative purpose without unnecessary burdens on otherwise lawful conduct.

(*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

Generally, a person must object to a challenged condition of probation in the trial court. Ordinarily failure to object will result in forfeiture of the issue on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) There is an exception to the rule of forfeiture in those cases where the challenge is to the constitutionality of the condition and the reviewing court can make such evaluation based on the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

We generally review trial court decisions on probation conditions under the abuse of discretion standard. Where there is a constitutional challenge we review the issue de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

2. The Search Condition

Over Ramirez's objection, the trial court imposed condition 6.n.: "Submit person, vehicle, residence, property, personal effects, computers and recordable media to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer."

Defense counsel argued the entire search condition was unwarranted, and even if a general search condition was warranted, there was no basis in this case for authorizing searches of computers and recordable media. Counsel cited *In re J.B.* (2015) 242 Cal.App.4th 749, which disapproved an electronic search condition where the crime had

nothing to do with the use of electronic devices or the use of the internet. The trial court rejected the argument, essentially finding a search condition was appropriate and routine.

At the conclusion of the sentencing hearing, and after the court had overruled the objection, the court said: "The other thing I want to put on the record is this, this crime involved obviously very negligent criminal acts that involved alcohol. Cell phone pictures are often taken of people out drinking with alcohol of alcohol [sic]. That is something probation needs to look at. Those pictures can be transferred to computers. I think a Fourth waiver is appropriate. That's all."

We are satisfied that a general Fourth Amendment waiver was appropriate in this case. Appellant's basic problem involves substance abuse. He had abused prescription drugs before and was intoxicated when he engaged in this senseless crime. The probation officer needs to monitor appellant's possession of substances. He is forbidden from possessing or consuming alcohol and a general search condition will both deter and monitor the essential cause of appellant's unlawful behavior.

We do not reach the same conclusion as to the search of computers and recordable media. The trial court's afterthought that some people take pictures of themselves drinking and place them on computers does not justify such intrusion into lawful behavior in this case. The crime did not involve computers nor is there anything in the probation report to indicate appellant's use of recordable media or computers would involve unlawful conduct or conduct in violation of probation. Nor is there anything other than the trial court's speculation that appellant might drink, take pictures of himself and store such pictures. The court's observation was simply an afterthought to justify

what the court believed to be a "routine" condition. There is no basis in this record to support the extension of the general search condition to computers or recordable media.

3. The Weapons Conditions

Without objection, the court imposed the following conditions regarding weapons:

"12.f. Do not knowingly own, transport, sell, or possess any weapon, firearm, replica firearm or weapon, ammunition, or any instrument used as a weapon. g. Do not remain in any building, vehicle or in the presence of any person where you know a firearm, deadly weapon, or ammunition exists."

Ramirez now contends the conditions are vague and overbroad because they do not adequately define "weapon," "deadly weapon," or "any instrument used as a weapon." We will reject his contentions.

The terms challenged here were before this court in *People v. Forrest* (2015) 237 Cal.App.4th 1074, 1081-1085.) In that case the court discussed each of the provisions which are challenged in this case. In *Forrest* we upheld the basically identical probation condition. We are satisfied that our decision in that case was correct and we will follow it here. We find it unnecessary to repeat the analysis in this opinion.

4. The Marijuana Condition

The marijuana condition which was imposed without objection provides: "14. No marijuana at all, even with a medical card, prescription or recommendation."

Ramirez now contends the provision is overbroad and violates the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5.). The People disagree with a number

of the defense arguments but properly concede the condition requires at least partial modification to include a knowledge element.

Since there was no objection in the trial court and the matter will have to be remanded for some modification, we decline the invitation to opine on issues not raised in the trial court. Such dispute is better resolved in the trial court before it is subjected to appellate review.

DISPOSITION

The judgment is modified to strike that part of probation condition 6.n. which provides "computers and recordable media." The court is further directed to review condition 14 and rule on the appellant's contention the provision is improper and to consider the People's concession that some modification is required. In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.